for valuing the rice the District Munsif has not recorded a finding what that rate is. It is therefore impossible now to pass a decree. The case will be sent back to the District Munsif with the direction to pass a decree for sale in accordance with the above. The appellants will have their costs in this Court and in the lower appellate Court. The District Munsif will provide for the costs hitherto incurred and hereafter to be incurred in his Court in the revised decree.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Sundaram Chetti.

KALEPALLI RAJITAGIRIPATHI (PLAINTIFF), APPELLANT,

1933, May 11.

v.

JANNAVULA PEDAKOTAYYA AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 112—Lawful ryot —Sale without proper notice to—Nullity of—Affixture— Service of notice by—When to be resorted to.

A sale held under section 112 of the Madras Estates Land Act without proper notice to the lawful ryot is a nullity. *Kootoorlingam Pillai* v. *Sennappa Reddiar*, (1931) 61 M.L.J. 203, approved.

Service of notice by affixture should be resorted to only if personal service cannot be effected.

APPEAL against the decree of the District Court of Kistna at Masulipatam in Original Suit No. 19 of 1927.

---

* Appeal No. 234 of 1928.

RAJITAGIRI-PATHI v. PEDAKOTAYYA.

T. Ramachandra Rao for appellant.

S. Varadachari and *S. V. Venugopalachari* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

CURGENVEN J. CURGENVEN J.—The plaintiff, who appeals, was a ryot of the South Vallur Zamindari, and his holding was sold in 1915 for arrears of rent under sections 111 *et seq* of the Madras Estates Land Act, bought in by the landholder, and regranted to the first defendant. He sued in 1927 to recover it, and without taking any evidence, the preliminary issue, whether the suit was within time, was decided against him, and the suit dismissed. The question involved in this issue is this:—whether the sale was held with jurisdiction and had therefore, if found irregular, to be set aside, or whether it was held without jurisdiction and was therefore a nullity. In the former case it is admitted that, whichever article of the Limitation Act is applicable—articles 12, 95 or 120—the suit would be out of time. In the latter the plaintiff could ignore the sale, and the suit would be within the twelve years available for recovery of the property.

The learned District Judge has proceeded upon the assumption, which is made upon the allegations in the plaint and in the absence of evidence to the contrary, that personal service of notice of the sale was neither made nor attempted upon the plaintiff, but that service by affixture was made; and he has held that, although the sale was irregular or illegal, it was not a nullity. Provision for the service of notice upon the defaulter

is contained in section 112 of the Act. Four copies of the notice are to be sent to the Collector,

> "who shall cause service to be effected by delivering a copy to the defaulter or to his authorized agent, or to some adult male member of his family at his usual place of abode, or, if such service cannot be effected, by affixing a copy thereof on some conspicuous part of his last known residence, if he has any, within ten miles of the holding, or on some conspicuous part of the holding."

There is no doubt, we think, that if no service is effected at all the sale will be void. That has been held by RAMESAM J. in *Kootoorlingam Pillai* v. *Sennappa Reddiar*(1), the learned Judge observing :

> "In my opinion, notice to the lawful ryot is such an important condition precedent to the holding of the sale under section 112 that the want of it must be regarded as making the sale a nullity."

A similar view has been expressed in the case of a sale in execution by a Full Bench of this Court in *Rajagopala Ayyar* v. *Ramanujachariar*(2) following a decision by the Privy Council in *Raghunath Das* v. *Sundar Das Khetri*(3). Mr. Varadachari would rely upon an earlier Full Bench decision in *Venkata* v. *Chengadu*(4) under the Madras Revenue Recovery Act (II of 1864), which held that failure to issue a notice was not a defect which affected jurisdiction, and that, so long as an arrear was found to exist, if a sale was conducted it was a proceeding under the Act which had to be set aside. Whether or not in view of the more recent decisions this is still good law so far as the Revenue Recovery Act is concerned we do not think it is necessary to express an opinion. There is enough authority,

(1) (1931) 61 M.L.J. 203.
(2) (1923) I.L.R. 47 Mad. 288 (F.B.).
(3) (1914) I.L.R. 42 Calc. 72 (P.C.).
(4) (1888) I.L.R. 12 Mad. 168 (F.B.).

RAJITAGIRI-PATHI v. PEDAKOTAYYA.

CURGENVEN J.

we think, for the view taken by RAMESAM J., which we propose to adopt.

The question then which this case actually raises is whether service by affixture, where no attempt has been made to effect personal service, stands upon a different footing from no service at all, and does not render a sale a nullity. The point is bare of authority, and we can only decide it by reference to general principles. In the first place, such a course involves an express breach of the statute, which provides that only if personal service cannot be effected shall service by affixture be resorted to. The reason for requiring this condition precedent to service by affixture is clear ; personal service alone affords a guarantee that the defaulter is apprised of the projected sale, and not until that course has been found impracticable may the less effectual method of service be adopted. The principle involved is of course that no order should be made against a person to his detriment unless and until he has been afforded an opportunity to appear and shew cause against it. It is a principle which is violated by the failure to issue notice, and it seems to us that it is also violated, though perhaps not so flagrantly, by the omission to follow a direction of law which is devised to secure that it is observed. The difference between the two cases is one of degree rather than of kind. In the one case no steps are taken to inform the defaulter, in the other the steps taken are so defective that in a certain number of cases he will not be informed. As an abstract proposition of law we think that in neither case ought a sale so held to be regarded as otherwise than a nullity.

We must accordingly differ from the Court below, and hold that on the materials at present available, i.e. the pleadings, the suit is not shown to be barred. It will of course be open to the defendants to show that the terms of section 112 with regard to personal service were complied with or that for any other reason appearing from the pleadings the suit is barred. The appeal is allowed, the decree set aside and the suit remanded for further trial and disposal according to law. Costs in this Court will abide the result. The appellant will be entitled to a refund of the court-fee on the memorandum of appeal.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Ramesam and Mr. Justice Curgenven.

In re KAVANNA NAGUTHA MUHAMMED NAINA MARIKAYAR (ACCUSED), PETITIONER.* 1933, May 30.

Fugitive Offenders Act of 1881 (44 *and* 45 *Vic. c.* 69), *ss.* 14 *and* 19—*Order refusing extradition—Order under ss.* 14 *or* 19—*Appeal to High Court from—Competency of—Remand of case for reception of evidence in—Power of—Code of Criminal Procedure* (*Act V of* 1898), *sec.* 491—*Person detained under order of High Court—Application by, for writ of* Habeas Corpus—*If lies to a Bench of same Court.*

A complaint was filed before the Police Magistrate of Singapore against petitioner who was subsequently arrested in British India on a warrant issued by the Police Magistrate to the District Superintendent of Police of South Arcot. Petitioner was brought before the District Magistrate under sec. 13 of the Fugitive Offenders Act, 1881, for extradition, which was

* Criminal Miscellaneous Petition No. 325 of 1933.